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ABSTRACT

This fact sheet uses a question-and-answer format to summarize information for parents of a child with mental retardation on planning for guardianship. Questions and answers address the following topics: what guardianship is; deciding whether a son or daughter needs guardianship; different types of guardianship (guardian of the person or property, full guardianship, limited guardianship, and temporary guardianship); what a public guardian is; and what corporate guardianship is. (DB)

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Q&A

Future Planning: Guardianship and People with Mental Retardation

by Rick Berkobien, Assistant Director, Department of Research and Program Services

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Q&A

Future Planning: Guardianship and People with Mental Retardation

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What is guardianship

Guardianship is the legal power to care for another person and manage his or her affairs. Each state has its own specific laws on guardianship, but the following generally describes the guardianship laws for adults throughout the United States:

Guardianship is a legal, not medical determination. When people become adults -- including people with mental retardation -- they get all the legal rights and responsibilities of any adult. Only the courts have the authority to remove these rights. A court makes this decision based on the person's abilities to handle personal decisions, money, property and similar matters. The incapacity (or legal inability) to handle these matters is grounds for a guardianship, not mental retardation.

How do I decide if my son or daughter needs guardianship?

Appointing a guardian for someone with mental retardation is a serious matter. This legal status deprives the person of some rights and independence, and has the potential for abuse because of the power it gives one individual over another. However, there may be different reasons why a son or daughter with mental retardation may need a guardian. Some common reasons are:

- A person with mental retardation needs medical care or other services that will not be provided unless there is a clear understanding about the person's legal capacity to consent to treatment or services. Health and service providers are becoming more concerned about liabilities when providing services to someone who may not have the capacity to make an informed consent to treatment or services.
- Parents or siblings cannot get access to important records or provide other help without guardianship. As a legal adult, a person with mental retardation must often give consent for the release of health and other records to parents or others. Health and service providers unsure of the person's ability to give consent may require documentation of the person's legal capacity before allowing access to records without the person's consent.
- The person has assets he or she cannot adequately manage. Guardianship is sometimes needed to ensure the assets are secure and used for the intended purpose, and only when money management alternatives (e.g., representative payeeship, etc.) will not provide sufficient protection.

Before pursuing guardianship, families should first try to determine if this legal protection is necessary. They need to examine why they feel a family member may require a guardian. Then, they need to familiarize themselves with less restrictive options that may meet these needs without resorting to guardianship.

What are the different types of guardianship?

Most states have different legal protective statuses or types of guardianship. State laws also often differ in defining incapacity, interpreting the guardian's duties and qualifications, terminology, reporting, documentation, costs and other areas related to guardianship.

In most states, the different types of guardianship are commonly called:

- Guardianship of the person or property
- Full guardianship
- Limited guardianship
- Temporary guardianship

(For specific information on states' laws, review the materials in the *Future Planning Resources* list noted at the end of this *Q&A*, confer with an attorney or contact your chapter of The Arc.)

Guardian of the person or property - This type of guardianship is sometimes characterized as "guardian of the person" or "guardian of the estate." In the guardian of the person, the individual needs a guardian to decide personal issues. These decisions may include where to live, consent for medical treatment and signing for services.

The court will usually identify specific decision-making areas under guardianship of the person. Courts frequently require periodic reports from the guardian about the guardian's actions over the course of the year or other period.

A guardian of the estate, called a conservator in most states, usually has power over the ward's money or property, not the individual's personal matters. Some states also do not require a judgment of the person's incapacity for a guardianship of the estate. The court can base the need for conservatorship by finding the person unable to manage assets or property.

The court requires this type of guardian to protect the person's property and use it for the person's care, support, education and other areas of general welfare. The guardian of the estate must use the ward's money for the ward's care and to account periodically to the court. This guardian's duties include careful investment of the guardianship assets. Guardians who have foolishly invested their ward's money may have to pay it back from their own money. They must also keep good records and make them available to the court. Some states require this guardian to put up a bond.

Full guardianship - A full or plenary guardianship basically includes guardianship over all the person's personal and property decision-making. It is usually a collection of all the powers and responsibilities mentioned above. Full guardianship is quite common, as it is the kind with which courts are most familiar.

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Since full guardianship involves controlling every aspect of the person's life, it is the most restrictive. However, the person under a full guardianship still retains his or her basic civil rights.

Full guardianship is useful for individuals whose mental retardation is so severe that they are not capable of making informed decisions, and should be used only after exploring the alternatives, including limited guardianship.

Limited guardianship - Many states have designed laws for "limited guardianship" to encourage a person to keep as much control as possible over his or her own life. Under this legal approach, the guardian has authority over the ward only in specifically defined matters. Every decision outside of those defined areas remains with the individual who has mental retardation. This form of guardianship allows the legal guardian to decide only in areas where the person is not capable.

Limited guardianship does require more attention from the court, attorneys and guardians to be sure it is specific to the individual's needs. Limited guardianship also must try to foresee all the individual's future legal needs. For example, an unpredictable legal situation might arise that is not covered under the limited guardianship. The guardian may not have the authority to provide needed protection and may have to return to court to get more decision-making power.

In many states, the court may authorize a mix of guardianships. For example, a person may need full guardianship of the estate and only limited guardianship over personal matters.

Temporary guardianship - Some states allow guardianship for a limited time. If a legal problem arises from a specific situation, the court can issue a "protective order" or temporary guardianship. Under a protective order, the court can give another person, a public guardian or corporate guardianship program (these last two are discussed later) the legal authority to handle that specific situation. When the problem is resolved, the order usually ends with no permanent guardianship.

Temporary guardianship usually only applies to temporary situations such as those caused by drugs, momentary illness or special medical situations. It has limited uses for long-term, reoccurring medical situations or incapacities due to a disability. This allows family members or an agency to pursue temporary guardianship if medical or other treatment is necessary but not provided because of questionable ability to consent. Once the person has temporary guardianship and treatment is provided, the guardianship is usually reviewed to determine if it should be removed.

What is a public guardian?

There will not always be a parent, other family member or friend to act as guardian of a person with mental retardation. For these and other reasons, many states have appointed public guardians that provide guardianship to people with no family available or willing to become guardian. This is referred to as public guardianship. Nonprofit organizations under contract with the state or local government may also provide public guardianship services.

Public guardians often have large caseloads, time-consuming paperwork and other duties, so must divide their time among responsibilities. These responsibilities can limit the time and resources public guardians have available to assist their wards. Thus, this type of guardianship is often considered as a "last resort," especially for those who can secure an individual guardian or get the services they need elsewhere.

State resources generally finance public guardianship. Although states usually have safeguards that free public guardians to advocate for their wards, a conflict of interest could arise if a public guardian should have to oppose another state-funded agency. If public guardianship is being considered for a person with mental retardation, care should be taken to be sure these guardians have the time, resources and latitude to fulfill their responsibilities.

What is corporate guardianship?

Many states allow incorporated agencies to provide guardianship and related services to people with mental retardation. In these agencies, the corporation is the guardian and assigns a professional staff person or volunteer to carry out guardianship responsibilities for the individual. These organizations often provide legal guardianship, individual service coordination, periodic support and even temporary guardianship. Parents can contract with such an agency to start specific services either after they die or when they can no longer help their child. Some state agencies also contract with these organizations for guardianship services. The organization's revenues may come from advanced funding from parents, bequests from the parent's estate, life insurance, United Way funding, contributions or subsidies from other organizations such as chapters of The Arc.

Before contracting with a corporate guardianship agency, parents should investigate the organization to be sure it is well managed, has stable funding and provides quality services. There must be adequate proof the program will remain solvent and continue to supply good services throughout the lives of its wards.

Note: This *Q&A* is only a general overview of one part of future planning. Families should explore with a knowledgeable attorney or advocate the alternatives to guardianship and other aspects of planning prior to making legally binding decisions. It is highly recommended that readers also review the materials on guardianship in The Arc's *Future Planning Resources* list.

To obtain a copy of The Arc's *Future Planning Resources*, a list of books, agencies and other resources that address financial and legal planning, send a request and $2 for postage and handling to:

The Arc of the United States, P.O. Box 1047,
Arlington, Texas 76010

Future Planning Resources can also be found on The Arc's World Wide Web site at:
http://TheArc.org/welcome.html

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